Supreme Court of the United States.

OCTOBER TERM, 1889.

ASHBEL GREEN and WILLIAM BOND, Trustees, *Complainants*, *vs.* THE CHICAGO, SAGINAW & CANADA RAILROAD COMPANY, ET AL., *Defendants.*	Foreclosure of Railroad Mortgage. No. 19.

Appeal from the Circuit Court of the United States for the Western District of Michigan. In Equity.

Brief on Behalf of Appellees,

Daniel E. Sickles, B. F. Stevens, and the Wrought Iron Bridge Company.

The two former appealed from the decree of the court below, but at the last term of this court their appeals, together with those of other parties to the suit, were dismissed, and the only remaining phase of the case for discussion is the appeal of Benjamin Richardson.

He seeks here to have the decree of the court below, so far modified and changed as to give him a larger claim upon the funds arising from a sale of the mortgaged property.

His complaint is that the decree below limited him to the holding of two hundred bonds, whereas he should

have been allowed to share on the basis of six hundred bonds, together with a claim upon eleven hundred and five other bonds, by way of salvage.

No supersedeas bonds were given upon the appeals taken, and accordingly the Court distributed the entire fund between the claimants, according to the decree theretofore made.

If this court should modify the decree in favor of the appellant Richardson, it would result in a claim against the several distributees of the fund to refund to him such proportion of the moneys already received by them as the modified decree of this court might require.

It will therefore be necessary to consider the standing of other claimants than Richardson, and to give consideration to the equities surrounding the attitude of all the parties, because the decree which will give Richardson a better position will be in effect a judgment against the rest.

The printed record is very voluminous, and as made up, somewhat difficult to understand.

The report of Hon. John W. Champlin, Special Master, which appears at pages 171 to 217, and the final decree, page 294, will probably be all that need be carefully examined to obtain a fair understanding of all the record shows.

The organization of this defendant company dated back to the fall of 1872, but nothing of moment was accomplished until the following spring, except that a number of persons subscribed for two hundred shares each of the capital stock, making 1890 shares in all.

May 13, 1873, these subscribers, for the most part, retired from the enterprise and made some sort of transfer of their rights to Craw and McChesney, two of the promoters of the scheme.

The right to stock so transferred seems not thereafter to

have cut any figure, and for all practical purposes may be treated as at this time passing out of sight.

May 15, 1873, the mortgage in suit was authorized, and on the 20th of June of the same year, a meeting of the Board of Directors was held. At this meeting an executive committee was appointed, and to it was delegated power to sell the bonds on such terms as they might deem for the interests of the company, and also "to sell and dispose of, or withhold if it deemed best, the unsubscribed shares of the capital stock of the company."

The 11th by-law, provided that subscriptions to the capital stock of the company might be received by the executive committee, but no certificate of stock should be issued until the stock shall have been paid for in full. The 12th by-law provided, that the unsubscribed capital stock might be issued to such persons and in such amounts as the executive committee or Board of Directors might designate or see fit.

But it will hardly be claimed that this section in any way affected or abrogated the conditions of the preceding one, to the effect that no certificate should be issued until the stock was fully paid. This for two reasons.

1. Because the construction of the two sections together would negative any such conclusion, and

2. Because to do otherwise would be in opposition to the law of the land, contrary to public policy, and in direct violation of the statutes of the State of Michigan.

"That it shall not be lawful for any railroad company existing by virtue of the laws of this State, nor for any officer of any such company, to sell, dispose of, or pledge any shares in the capital stock of such company, nor to issue certificates of shares in the capital stock of such company, until the shares so sold, disposed of, or pledged,

and the shares for which such certificates are to be issued, shall have been fully paid."

It must be assumed that 5 per cent. of the 1890 shares subscribed for had been paid in, because an affidavit to that effect was necessary, and was made, in accordance with the laws of the State. It will not be necessary to trace the money arising from this source, for it was doubtless spent.

And so we see that on the 8th day of July, 1873, the defendant corporation had no assets except its capital stock and a quantity of aid notes which had been obtained by the officers of the company, conditioned upon the construction and operation of the road. But these notes upon their face, amounted to a considerable sum, and if paid would go a long ways towards the preliminary work of the road. We gather from the testimony, too, that the future prosperity and earnings of the road were made to look very bright, and that large timber contracts and other contracts were in contemplation, which would give to persons owning stock of the company a fine prospect to make large gains.

In this status the negotiations were begun. These people were not adepts in this sort of business, but they had come to know in a general way that it was a common thing for roads to be built without money, except perhaps some temporary advances, and that the promoters, after its construction were not only paid back what they advanced, but were the owners of the property, subject to the morttage, which is an ever present factor in schemes of this kind.

Now keeping in view the authority of the executive committee, the by-laws which the company had adopted, and the statutes of the State of Michigan, which I have

quoted, these people made the contract in question. In this four things were agreed upon :

1. That they would loan money to the company.

2. That the company should give its promissory notes as evidence of such loan, and would pay back the amount thereof with interest at ten per cent.

3. That the company would in addition give itself to these parties, who were thereafter to be the owners of it.

4. They were to have a director on the board to watch and care for their own property.

According to the report the money was advanced between the 14th and 19th of July, 1873, and this contemplated director was appointed on the 28th of the same month. At this time no stock had been issued, but these parties received as a part of this bargain their 800 shares. It was full paid, according to the bargain, and as nothing was outstanding except this, they at once became complete masters of the situation.

March 12, 1874, a further loan was made. Some of the terms of the agreement in this connection were, that these parties were to receive (*a*) the note of the company for the full sum, with ten per cent. interest, (*b*) 500 additional shares of the stock as bonus, (*c*) $100,000 of the bonds, (*d*) one hundred other thousand dollars of bonds as a forfeit in case the agreement was not performed.

Prior to the latter loan, when these claimants were the owners of everything, and knowing that there would be no profit in themselves building the road, the usual plan was resorted to, of selling the bonds in Europe, and accordingly, one of the board of directors, clothed with full power and authority as the sole representative of the company for this purpose, was started off to Europe. They wanted the bonds sold for two reasons; first, to pay back to them-

selves what they had loaned themselves; second, to get money to build the road and give value to their stock. The bonds they did not want. They were quite willing that all of these should be sold. It was the stock, to wit, the property subject to the mortgage, which they wanted.

At a meeting held February 18, 1874, the following resolution was passed: "That Joseph Henry McChesney, of the city of New York, be and is hereby constituted and appointed the true, sole and lawful attorney of the Chicago, Saginaw & Canada Railroad Company, and in the name, place and stead of said company to negotiate and sell in Europe the bonds issued in, under and by virtue of a mortgage dated the 21st day of May, 1873, for such a price as said attorney shall deem best for the interests of this company, and this company doth hereby give to the said J. H. McChesney full power to do everything whatsoever that is requisite and necessary to be done in the premises, as fully as could be done if said company were present personally by its duly constituted officers; and this company doth futher hereby give to the said J. H. McChesney full power to appoint and substitute and to revoke such appointment, any person or persons as in his discretion he may think proper, to carry out the powers and duties herein given, ratifying and confirming all that the said attorney of this company, or such attorney appointed by him, shall lawfully do and cause to be done by virtue hereof." This resolution is here given at length for present and future use.

In contemplation of the success of this attorney in selling the bonds and an early repayment, the loan was made March 16, 1874, just one month later. It is fair to assume that they expected that the sale of the bonds would pay their notes. From what other source did they expect the

money to come? And what did they want the stock for?

The scheme continued without much being accomplished on this side until the advent of the appellant, who entered into a contract with the defendant on March 31, 1875. (Record, page 190.)

An examination of this paper shows what, from the outset the appellant intended to do, and each move subsequently made by him, or by those whom he controlled, confirms this statement.

It is sufficient at this time to say, that by virtue of the contract in question and subsequent contracts, on July 5th and August 3d of the same year, he makes claim to 600 of the bonds of the company, of $1,000 each.

During the summer of 1874 McChesney was in Europe under the exclusive power of attorney which I have heretofore set out, representing that the defendant corporation had large and valuable assets; that he was the sole agent for the sale of bonds under the mortgage in question, that no bonds had been disposed of and that he was in Europe for the purpose of finding a purchaser for the entire issue. (Record, 202–692.)

At this time Gen. Sickles was living abroad, was well and favorably known, and probably no American in Europe at that time could more easily approach bankers and other investors than he.

Mr. B. F. Stevens also was an American who had resided a long time in London, and had a broad and valuable acquaintance.

To Gen. Sickles Mr. McChesney went with his mission.

The result of his dealings with Gen. Sickles appears in the master's report, (Record, page 202); in the evidence of Gen. Sickles taken in New York, (Record, page 470); and his subsequent testimony taken before the master, page 692.

Briefly stated, Gen. Sickles procured a loan for the company of $100,000. This loan was made by Mr. George G. Sickles, and there was taken as security 250 of the mortgage bonds.

In the following spring after Mr. Richardson had come into the company, it was determined to have this note renewed, and it was renewed accordingly.

Prior to its maturity, however, Gen. Sickles was induced to buy outright 163 of the bonds. For these he paid the entire sum for which the 250 referred to stood as a pledge.

It may well be assumed that from first to last the representations made by the company's agent to Gen. Sickles were believed and acted upon, else the 250 bonds would not have been surrendered, and 163 taken in their stead for a like consideration.

An examination of the record and of the uncontradicted testimony of Gen. Sickles, places him in the attitude of an innocent purchaser of these bonds, and one of the very few creditors of the company not chargeable with notice of the company's insolvency, and of the frauds through which it was being maintained.

It was urged in the court below that he was entitled to priority over the holders of bonds who were at the same time officers, promoters and directors of the company.

The decree below disallowed this claim, and it was his appeal from that decision which was dismissed at the last term.

The claim of the Wrought Iron Bridge Company, of Canton, Ohio, is sufficiently set out at page 209 of the record.

At page 210 the amount stated is $3,300. The amount should have been $23,300.

From this statement of facts it sufficiently appears that this claimant in good faith contributed to the defendant company a considerable portion of these assets, to-wit, the bridge across Saginaw river, by which it was expected the railroad would cross to that city.

It nowhere appears in the evidence that the transactions of this claimant are not free from all question, or that the facts furnished any reason why the claimant should not have been paid in full.

The decree allowed them to share in the fund on the basis of the sixty-six bonds which had become its actual property, and it now stands here resisting the claim of Richardson to have a portion of the money so paid to it refunded.

The claim of Mr. Stevens appears in the record, page 203. The amount of the indebtedness to Stevens has never been questioned nor his good faith in dealing with the company.

By reason of the authority with which McChesney was clothed and sent abroad, claimant was easily imposed upon as to the prospects and financial responsibility of the company.

He was allowed to share in the proceeds upon the 32 bonds which he held, and he now simply asks that he may be allowed to retain the sum received.

From this brief statement of the facts, I contend that the appellant was well treated by the decree below, and that he is not entitled to have the same modified in his favor.

1. While the appellant might fairly have dealt with this company by loaning it money, and by taking bonds as security, he was not content to do so, and I submit that the contract of April 3, 1885, was void as against public policy.

This was so because the fifth paragraph provided that he should be a director; and the seventh clause is also void as being contrary to public policy, and contrary to the statute already quoted, forbidding the issuing of stock not paid for.

The transaction of July 5th, by which he claims the right to an additional 100 bonds was also void because he had already forced himself upon the board of directors, and had also procured his own agent, Col. Elwell, to be a director and secretary, and from the small amount of money that he agreed to advance, it is apparent that he dominated the board of directors, and procured such action as he saw fit to exact.

The same was also true of the transaction of August 3 following, by which he claims to have become entitled to 300 more bonds.

The facts connected with these transactions are clearly set forth in the report of the special master at pages 201-2.

2. The appellant is liable to be charged as of the date when taken, with the bonus stock which he insisted upon receiving, and which he received.

The opinion of the master as to this appears in the record at page 188 and following; and the argument is that this appellant having taken the stock, in violation of law, and having entered into corporate relations with the corporation and its stockholders—having by virtue of this stock elected directors, and held himself out to the public and to other purchasers of bonds, and creditors as a bona

fide stockholder, that the law raises an implied promise to pay for the shares at their par value.

But if there were no contract relations between the shareholders and the company, and no promise to pay for such shares, to serve as a basis of set off, yet under the maxim that "He that asks equity must first do equity," he should first pay to the company the value of the shares before he can be allowed to participate in the fund, and that in arriving at the amount which he should be allowed, the value of the stock should be deducted from the amount owing.

In this view of the law the master and court below concurred, but because it did not appear that the stock had a real value, it was treatad as valueless.

We think this was error. *Exparte Daniel* 1, *DeGex and Jones*, 372.

This is a leading case and is several times referred to with approval in Lindley on partnership. See Vol. 2 Eng. Ed. pages 1344, 1347, 1363, 1380 and 1390.

The rule there laid down is that the par value of stock must be paid.

See also *DeRuvigne's* case, 5 Ch. D. 306—where the directors was made to pay full value.

In *Scoville* vs. *Thayer*, 105 U. S. 154, this subject was under discussion, and after referring to a possibly contrary doctrine in some of the English cases, tho Court says:

"But the doctrine of this court is that such a contract, however binding on the company, is a fraud in law on its creditors, which they can set aside. That when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity a trust fund for the payment of creditors."

In *Barry* vs. *the Merchant's Exchange Co.*, 1 Sanf. Ch. 305, in speaking of the nature of the capital stock of a corporation it is said: "It is the aggregate amount of the funds of the corporators which are combined together under a charter for the attainment of some common object of public convenience or private utility." From the very nature of this definition a principle is deduced which has come to be perfectly well understood by courts throughout the country generally, that this fund or this aggregate amount of funds, called capital stock, constitutes a pledge or fund upon which the commercial credit of the corporation must largely depend, and upon which parties invited to deal with it are assured of security. "Every contract made by a corporation involves an implied representation that the capital subscribed at the formation of the company has been preserved as a fund pledged for the security of creditors, and a corporation would be guilty of a misrepresentation and a fraud if it should obtain credit by professing to carry on business with the capital indicated by its charter after that fund had in fact been secretly withdrawn or diminished." Morawetz, Sec. 586.

And it may be also said that contrats made between the corporation and the persons who are, to all intents and purposes, the officers and directors of the company, as individuals, is void as against public policy, and must fail.

Wardell vs. *R. R. Co.*, 103 U. S., 651, and cases cited.

This case distinctly holds the doctrine contended for, to-wit: That the directors of a corporation are subject to the obligations which the law imposes upon trustees and agents, and that they cannot with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests.

In addition to the cases referred to by the master at page 189 of the record, I submit the following:

Sawyer vs. *Upton*, 91 U. S., 60;
Griswold vs. *Seligman*, 72 Mo., 110;
Upton vs. *Engelhart*, 3 Dillon, 497;
Wardell vs. *R. R. Co.*, 103 U. S., 651;
57 N. Y., 518;
82 N. Y., 535;
Gardner vs. *Butler*, 30 N. J. Eq., 702;
Webster vs. *Upton*, 91 U. S., 66-65-45;
Duncomb vs. N. Y. H. & N. R. R. Co., 88 N. Y., 1.

It should be noted that in the State of Michigan it was unlawful at the time in question—made so by statute—to sell, dispose of or pledge any shares in the capital stock of this company, or to issue certificates of shares in the capital stock, until the shares so sold, disposed of or pledged, and the shares for which such certificates were to be issued should have been fully paid. 2 Compiled Laws, Sec. 7757.

The fol owing section makes it the duty of the President and Treasurer to report to the Secretary of State, by a sworn statement, the numbers of shares issued, sold, pledged or disposed of, at the date of such report.

The case at bar therefore belongs to a class in which both English and Federal courts would require the par value of stock to be paid up in full.

In *Foreman* vs. *Bigelow*, 4 Clifford, Ct. Court, 508, it was said that the mere fact that the person has become a shareholder pursuant to a scheme which is *ultra vires*, will not relieve him from liability as a contributory, where the stock cannot be considered as legally existing, and he was himself a party to the scheme, or had knowledge of it.

See also *Upton* vs. *Tribelcock*, 91 U. S., 47.

The taking of this bonus stock as fully paid was a clear

fraud. It represented nearly $300,000 of the trust fund, and this was agreed to not only by the board of directors on the one part, but by the parties receiving it; and by the very contract whereby they agreed to make the advances.

Those engaged in the transaction not only defrauded the corporation, but also its creditors, and the public.

The language of Justices Clifford and Lowell—*Foreman* vs. *Bigelow*—supra, applies: "Those who issued a certificate for paid up shares in money, when the money has not been paid, are guilty of a personal wrong toward the company, and may be made answerable for it in exactly the same way and to the same extent as if money had been taken out of the coffers of the company to pay up the shares."

It was also held in *Sawyer* vs. *Hoag*, 17 Wall., 622, as follows:

"It is therefore but just that when the interest of the public, or of strangers dealing with a corporation, is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be affected with anything unfair toward such third person calculated to injure him or designed intentionally or inequitably to screen the stockholders from loss at the expense of the general creditor it should be disregarded or annulled so far as it may inequitably affect him."

See also *Genessee Bank* vs. *Michigan Bridge Co.*, 57 Mich., 438.

Rice's Appeal, 79 Pa. State, 168.

The parties receiving this bonus stock cannot claim that at the time of their original advances they were dealing at arm's length with the company, for the plain reason that they stipulated in their original contract as a condition for

the making of the advances, that they should receive paid up shares by way of bonus.

If these shares, amounting to nearly $300,000, had in fact been fully paid the company would have been solvent.

But as a matter of fact the company never for an hour was solvent, and this was fully known to the parties who were abstracting the very life blood out of it.

See *Hawkins* vs. *Glenn*, 131 U. S., 319.

They knew also that it was a clear violation of their duty as directors, a breach of trust, and a violation of the statutes of the State of Michigan.

In the language of the *Foreman* case, cited—They were "All guilty perpetrators of the fraud." They knew that in case their accredited agent should succeed in selling the bonds of the company that the purchasers would be cheated out of their money in whole or in part.

Meantime they, as the directors and promoters of the scheme, and also the owners of every dollar of the outstanding capital stock, would manipulate the corporation for their own interests, totally regardless of the interests of innocent creditors.

In the language of this court, in a case involving the same principle, it was said: "A scheme utterly indefensible and illegal." "Unlawful device to enrich themselves, to the detriment of stockholders and creditors of the company." "It was a fraudulent proceeding on the part of the directors and contractors." And they "Can derive no benefit from the contract thus tainted." 103 U. S., 651, supra.

3. The 400 bonds disallowed the appellant were never delivered.

The facts surrounding the transactions of July 5, through which he claims 100 bonds, and of August 3, through which he claims 300 more, were fully gone into at the hearing in the court below.

After the master had disallowed these 400 bonds, and after the report was filed, Richardson and his assignee, Day, took more proofs in New York and Michigan, with a view of bolstering up the claim, viz: That having the custody of all the bonds belonging to the company, in his capacity of official custodian, and the bonds having never been issued, he set apart 400 as those to which he was entitled.

It was argued that Mr. Ferry had not resigned as treasurer. It is true that the resignation was conditional, but whether he was fully out of office or not is immaterial, because Richardson took the office and the bonds as his successor. He had no other title to them.

His own testimony contained in letters to Elwell, his confidential agent, written August 20, 1876, shows best what he did :—

"Old Jackson removed deposits; so have I to day. Childs and Kelley's clerk helped count, and *I put them in three tin boxes*, and was too late to get them away. I had boxes locked up. I marked my four hundred; labels on each, 'The property of B. Richardson,'" etc., etc.

In another letter on the following day, he says :—"I have written you yesterday that I had secured bonds, but this day old Hickory Jackson was supreme. He sweat a thousand streams, and moved the deposits from one big wig wam to another, but my old predecessor Jackson moved his so that they never came out. Not so with Cap. Ben, for if he succeeds in getting those from the now apparent big Mogul McChesney in London—or rather traveling in Switzerland—then in due time will our bonds shine."

Further on in the same letter he says:—"Remember I am the bona fide treasurer, as the resolution passed was when the books was examined and found correct. That was done, and books right and B. R. is power."

It will be seen that there was no pretense that the 400 bonds now claimed were separated from the rest; that the entire unissued bonds belonging to the company were put in three boxes and carried to another bank.

The whole scheme surrounding this performance was dishonest and was devised for the purpose of defrauding the company and everybody else who had any interest in it. (See record pages 195–202.)

4. If it could be said that these four hundred bonds were ever delivered, and that the dealings of Richardson with the company had been such that he could legally and equitably hold them, then I contend that he relinquished his right to them at the meeting of the parties in Philadelphia, October 11, 1875. (Record page 198.)

The statement of facts made by the special master, and appearing in the record at the above page, is a sufficient argument in support of this point.

The action at the meeting referred to, in taking all these bonds into his possession as custodian for the company, is strong evidence that he had never taken them into his possession under the pledge at all, and that the pretended marking of 400, and placing them side by side with the property of the company was not relied upon by him as any evidence of personal right or possession.

5. The 400 bonds were the property of the company, unissued and unpledged, because they were so treated by

Richardson in his hostile proceeding against the company in New York, under his levy and sale. (Record page 461.)

This sale covered all the unissued bonds belonging to the company, including the 400 in question.

Upon the sale of these unissued bonds there was realized 174,555, 43-100 dollars, as appears by the receipt of the plaintiff's attorney to the sheriff, at page 463 of the record.

This proceeding on the part of the appellant was so surrounded by fraud that a Court of Equity should hold that he thereby relinquished all claim to any securities of the company covered by the pretended sale.

I represent here appellees who are bona fide creditors of this corporation, and we are asked to refund a portion of the small percentage received by us on our indebtedness.

This is demanded too at the hands of a man whose every act connected with this company was stimulated by greed and by overreaching attempts at fraud. This appears at every stage of his dealings and there is no legal or equitable principle upon which he can demand more than he has already received. Indeed, these appellees whom I represent, were well entitled to a preference in the distribution of this fund; but since their way to obtain a better decree is cut off, the Court can at least protect them from further ravages at the hands of this apellant.

6. The claim made by appellant upon 1105 bonds because he paid money to release them from the London bankers is sufficiently disposed of by the report of the master. (Record, page 200.)

There is nothing whatever from which an argument can be fairly drawn giving appellant the right claimed.

This would be true even if the conduct of appellant had been such as to commend him to a court of equity.

T. J. O'BRIEN,

Counsel for Appellees Sickles, Stevens, and the Wrought Iron Bridge Company.

OCT 15 1889
JAMES H. McKENNEY
CLERK

IN THE

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Appellants,

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Appellees.

No 19.

BRIEF FOR APPELLEES,

Thomas W. Ferry, Edward P. Ferry, and Frederick A. Nims.

D. A. McKNIGHT,
Counsel for Appellees.

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JURISDICTION.

In respect to the allowances by the court below to the above-named appellees, the review which is asked under this appeal from the decree of October 8, 1883, is founded on Exceptions 20, 22, and 24 to the master's report, which were overruled by the decree of May 3, 1883.

It is submitted that this Court is without jurisdiction to review the decree of October 8, 1883, in respect to the said allowances, under said exceptions.

All of the questions raised by said exceptions were finally disposed of by the decree of May 3, 1883,

(Record, p. 294), and were not referred to in the petition for rehearing, (340), or disturbed by the decree of October 8, 1883, (359).

Said petition for rehearing was filed August 6, 1883, and prior thereto, to wit, on July 12, 1883, Richardson and Day had prayed for and been allowed an appeal from the decree of May 3, 1883, (337), which said appeal was dismissed at the last term of this Court, (130 U. S., 104), not because said decree was not a final decree, but because said appeal was not properly filed.

In view of these facts, it would seem that the decree of May 3, 1883, in respect of the questions raised by said exceptions, is the final decree contemplated by the statute providing for appeals, and that they can not be reviewed under the pending appeal from the decree of October 8, 1883.

Such, indeed, seems to be the reasonable inference from the language of the Court in the opinion above cited, namely:

"These provisions save the appeal of Richardson and Day from the decree of October 8, 1883, as to amount, and enable them to have adjudicated by this Court, on the hearing of that appeal, at least their claim in respect of the four hundred bonds not allowed to them."

Exception 24.

Appellants' 24th Exception, in so far as it concerns the appellees above named, is as follows, (Record, p. 260):

"Twenty-fourth: Exception is made to the allowance by said master of . . . $1,667.97 to the trustees' solicitor, F. A. Nims, the same having been allowed only upon *ex parte* affidavits, and being otherwise inequitable and unjust."

There appears to be no reference to this exception in the brief of appellants filed January 19, 1889, and it is presumably abandoned.

Mr. Nims was the solicitor for the trustees in the foreclosure proceedings, as shown by the record. The decree of foreclosure directed that the master "shall report what, if anything, is a proper sum to be allowed . . . for the fees, expenses, and disbursements of counsel," (87). An itemized account, verified by the solicitor's oath, was filed, (684), which was supported in part by the affidavits of Ashbel Green, one of the trustees, (680), and of Charles B. Alexander, counsel for the trustees, (681). The master reported (216) an allowance of $1,660.97, which the decree of May 3, 1883, confirmed, (297).

ARGUMENT.

The allowance of counsel fees, to be paid out of the surplus, is customary and proper, and the court has discretion to fix the amount. (Wiltsie on Mortgage Foreclosures, Sec. 869; Bronson *v.* La. C. & M. RR. Co., 2 Wall., 283; Cowdrey *v.* G. H. & H. RR. Co., 93 U. S., 352; Trustees *v.* Greenough, 105 U. S., 527).

EXCEPTION 22.

Appellant's 22d Exception to the master's report, in so far as it concerns the appellees above named, is as follows, (Record, p. 259):

"Twenty-second: Further exception is made to the allowance of said master to the following-named persons of the following-named amount of bonds and interest, as collateral to the following amount of debt:

"1. Fred. A. Nims, 12 bonds; principal $12,000, interest $10,494.24; debt $6,000, interest $2,651.83.

"3. Edward P. Ferry, 19 bonds; principal $19,000, interest $10,461.02; debt $9,312.22; interest $4,115.64.

"4. Thomas White Ferry, 60 bonds; principal $60,000, interest $52,471.20; debt $20,000, interest $13,410.61."

The only ground for the foregoing exception stated in appellants' brief filed January 19, 1889, appears on p. 46, and is as follows:

"Exception Twenty-second. (R. 259).

"Clause 1, 2, 3, is directed to the question, whether bonds voted as *late* as July 8, 1876, two for one, as collateral for officers' (solicitor, treasurer, and secretary) *services*, should participate in the distribution of foreclosure sale proceeds, on *equality* with money loaned."

There is no argument on the question thus raised, which is assumed to be the only question involved.

"Clause 2" referred to the company's secretary, John A. Elwell, who is not represented by the undersigned counsel.

Clause 4 is not referred to in appellants' brief, and it is assumed that the exception to the said allowance to T. W. Ferry has been abandoned.

Claim of F. A. Nims.

The record shows (778) that Mr. Nims was elected the solicitor for the company on December 24, 1872, and that on May 15, 1873, his salary was fixed at $6,000 per annum, (791). On the last-named date he was elected a director of the company, being the owner of two hundred and ten shares of the subscribed stock, (802), on which five per centum in cash had been paid by his assignor, (777), and for which were afterwards issued to him ten shares of full-paid stock, (810). He served as a director without salary.

He served as the company's solicitor until these fore-

closure proceedings were instituted, but (822) without salary after January 1, 1876. At the salary named, his account, from May, 1873, to December, 1875, amounted to $16,000.

On July 8, 1876, the board of directors, Mr. Richardson being present, ordered the issue of the company's note to him, with twelve bonds as collateral security, (829). On July 28, 1876, the bonds were delivered, (672). The note dated July 8, 1876, was for $6,000 for services "from May, 1873," that is, apparently, for the entire period of service, and the claim was duly proved, (559, 561, 565), allowed by the master, (203), and by the decree of May 3, 1883, placed in the third class of distributees, (299), along with that of Benjamin Richardson.

Claim of E. P. Ferry.

The record shows (796) that on July 28, 1873, Mr. Ferry was elected a director of the company, and on the same day was chosen its treasurer, and his salary as treasurer fixed at $6,000 per annum. He served in these capacities (except perhaps for a short time as treasurer) until May 23, 1877, when he resigned, (831), but after January 1, 1876, without salary, (822).

He was the owner of two hundred and ten shares of stock, (802), on which five per centum in cash had been paid by his assignor, (777), and for which were afterwards issued to him eleven shares of full-paid stock, (810). Mr. Ferry and Mr. Nims, being each entitled to ten and one-half shares for the five per centum paid in, agreed to divide them so that the former should have eleven shares and the latter ten.

On July 8, 1876, the board of directors, Mr. Richardson being present, ordered the issue of a note "in settlement of the vouchers issued to him or held by him," with bonds at fifty per cent. of their par value as

collateral security, (828). For what these "vouchers" were issued does not distinctly appear, but in his testimony (699) Ferry refers to his "vouchers for disbursements of money," and appellants' brief filed January 19, 1889, states (p. 25) that at said meeting "his then unadjusted (unpaid) accounts were provided for with collateral bonds." On August 16, 1875, vouchers were issued to Ferry for $9,880.35, advanced by him for the company, (368). From of all which it would seem that the vouchers in question were issued for money advanced by him for the company. There is no indication in the record that vouchers were ever issued for salaries.

The note, dated July 8, 1876, for $9,312.22, secured by nineteen bonds, was duly proved up as a claim, (559), allowed by the master, (204), and by the decree of May 3, 1883, placed in the third class of distributees, (299).

Claim of T. W. Ferry.

The record shows (667) that on December 5, 1874, the company issued forty bonds to the First National Bank of Grand Haven, Mich., as security for a loan of $20,000. Two notes, each for $10,000, were afterwards given as second renewals of the original, (668). On July 8, 1876, the board of directors ordered the delivery to said bank of twenty bonds "as additional security," (829). Mr. Ferry purchased the notes on October 11, 1877, and received the collateral security with them, (562).

The claim was duly proved up, (560–563, 667–669), allowed by the master, (204), and placed by the decree of May 3, 1883, in the third class of distributees, (299).

ARGUMENT.

First. The equities between Richardson and T. W. Ferry are equal, if not superior on the side of the latter.

Richardson made a contract with the company on March 31, 1875, under which he was to have notes for his advances, secured by the company's mortgage bonds, (Record, p. 190). His account (995) shows that his advances were made at various times from April 1, 1875, to June 3, 1876. On April 5, 1875, he received two hundred bonds, (673), and the additional four hundred which he claims on August 20, 1875, if at all, (197, 198). But his account was not liquidated until July 8, 1876, (827), and on the same day the stock notes, which the bonds were to secure, were issued to him, (726, 727). These notes were afterwards exchanged for demand notes, (1061), upon which Richardson sued the company and recovered judgment, (901–905). On this judgment Richardson founded his claim as an intervening bondholder, (33), and on it the master made his allowance, (201).

T. W. Ferry's claim is for a loan to the company by a bank, in December, 1874, for which notes and forty bonds were then delivered, the additional twenty bonds being delivered about July 8, 1876.

Both securities were given for loans of money, and the equities are so far equal. But, as claimed by the parties, Richardson's security is relatively larger than Ferry's, and whilst Ferry received his additional bonds at a later date than Richardson, Richardson received his bonds before his advances were made, and before his account had been liquidated, and the notes which the bonds were to secure had been issued.

In this distribution, in determining priorities and computing interest, it is submitted that Richardson should be held, under his contract, to have received his bonds on July 8, 1876, the day on which the notes were issued to him.

Second. E. P. Ferry's bonds were issued to him as security for a note reimbursing him for advances of money, as the record seems to establish, and as appellants' brief, at page 25, seems to assert. Consequently they were *not* for his services as treasurer, as said brief, at page 48, alleges. In this view of the case, he is on an equality with Richardson as a lender of money to the company, and, as a secured creditor, the equities are in his favor for the reasons stated under the last head.

If, however, it was his salary as treasurer which was secured, the argument under the next head applies to his case.

Third. The equities between Richardson and F. A. Nims, the company's solicitor, are equal, if not superior on the side of the latter.

Manifestly the services of Mr. Nims as solicitor were relatively as valuable to the company and to the bondholders as were Mr. Richardson's advances of money. As a pledgee of bonds for a valid antecedent debt, he is a *bona-fide* holder for value, equally with Richardson, (Spencer *v.* Sloan, 108 Ind., 183; Sayles *v.* Garrett, 110 U. S., 288, 294).

There can be no impeachment of the fairness of his contract, for it was made, as was Richardson's, before he became a director. On these facts he was a *bona-fide* creditor, entitled to recover his salary, notwithstanding he was a director at date of the settlement, (Morawetz on Private Corporations, Sec. 508; Wood's Railway Law, Sec. 158).

Mr. Nims was liberal in respect of his claim for salary, serving without pay when the company became embarrassed, and receiving nearly two-thirds less than his claim when his accounts were adjusted, as the

record indicates. Mr. Richardson was "greedy" (appellants' brief, p. 47) at all times, and on the settlement of his account charged up a heavy interest against the company, (827, 996).

Throughout the brief of Richardson's counsel runs a thread of suggestion that Richardson's equities are superior to those of the other bondholders, because his money, or most of it, was used to purchase iron for the road. Such a claim was set up by Pulsford in the case of Galveston Railroad *v.* Cowdrey, (11 Wall., 459, 482), and was overruled.

Furthermore, at the meeting of the board on July 8, 1876, when the accounts of both were adjusted, Richardson was present when the resolution was passed authorizing the issue of bonds to Mr. Nims. Not opposing it, it is to be presumed that he assented to it, (Mowrey *v.* I. & C. RR. Co., 4 Biss., 78). Indeed, all of the resolutions of that date settling accounts were prepared months beforehand, in expectation of a foreclosure procedure, and with Richardson's concurrence, (1014, 1015, 1058). For these reasons he ought not now to be heard to object to the equality in security which he then assented to.

And finally, these bonds were issued under a mortgage which provided for foreclosure in the event of default by the company in the payment of principal or interest, and for an application of the proceeds in satisfaction of the bonds "ratably and without discrimination or preference," (24).

Exception 20.

Appellants' 20th Exception to the master's report is as follows, (Record, p 259):

"Twentieth. In that the said master's report is partial and unequal in this, to wit: He allows E. P. Ferry,

treasurer of the defendant, to hold nineteen bonds as collateral upon a state of facts in all respects similar to those upon which he refuses to allow Richardson one hundred."

In reference to this exception, the appellants' brief filed January 19, 1889, after referring to the master's finding in regard to Richardson's election as treasurer, namely, that it was "to take effect as soon as Mr. Ferry's accounts were adjusted (paid) by the executive committee," states (p. 25) as follows:

"This was never done, for at the directors' meeting of July 8, 1876, his then unadjusted (unpaid) accounts were provided for with collateral bonds; which collateral bonds, by the way, were never *delivered* to him. He simply *took* them, by authority of the resolution, from the unissued bonds in his own custody as treasurer, as the master finds Richardson did. Yet the master finds Ferry's taking to be lawful, (covered by exception twentieth), and finds Richardson's unlawful. Certainly the rule is the same for resident Ferry and non-resident Richardson—in Federal Courts."

It would seem, therefore, that the purport of the exception, in one aspect of it, is to object to Mr. Ferry's claim as a bondholder on the ground that the bonds were not lawfully pledged.

The record shows (p. 828) that at the meeting of the board of directors on July 8, 1876, a resolution was passed authorizing "the secretary and auditor" of the company to issue to Mr. Ferry the company's note, secured by certain bonds, "in settlement of the vouchers issued to him or held by him" as treasurer. When called as a witness, (698), Mr. Ferry produced the bonds remaining in his possession, and the receipts for those issued by him, and testified (700) that he had accounted for them all "with the exception of the sixty given to the First National Bank of Grand Haven as

collateral security, and nineteen retained by myself as collateral security, by order of the board of July 8, 1876."

It is supposed to be upon this statement that the exception is founded, and this Court is asked to find that the bonds were not issued, or delivered, as contemplated by the resolution.

ARGUMENT.

First. When Mr. Ferry's claim was proved, John A. Elwell was called as a witness, and testified (558) that he was "secretary and auditor of the said corporation in July, 1876." He also put in evidence (559, 600) the original resolution of the board, the note issued in pursuance thereof and signed by "John A. Elwell, Sec'y and Auditor," and the nineteen collateral bonds, numbered 4282 to 4300, which, he testified, were "described in the aforesaid note." The said note was made an exhibit, but does not appear in this record. The witness did not in terms testify that he had delivered the bonds, but it is plain that he must have done so from other evidence in the record.

Richardson was allowed four hundred bonds as additional security on July 5 and August 3, 1875, (806, 808,) and on the latter date he was also conditionally elected the treasurer, (808). He testifies (1170) that he afterwards received an order from treasurer Ferry (Exhibit No. 6, p. 369) on the Mercantile Trust Company, of New York, for the delivery to him of the company's bonds on deposit there; (1171) that he had these bonds counted and a memorandum of them made (Exhibit No. 1, p. 371) on August 20, 1875; (1172) that on August 21, 1875, he separated four hundred bonds, (Exhibit No. 2, p. 372), of the twenty-nine hundred and seventy-four bonds which he then received, for his

personal use; and (1183) that he took the remainder to the Park Bank, where they remained until delivered to Mr. Elwell. Elwell testifies that on July 20, 1876, he received the bonds which had been in Richardson's custody and at the Park Bank (1100, 1101, 1066), together with eleven hundred and five from the banking house of Eugene Kelly & Co. (1065), but that he did not count them until August 11, 1876, when they were attached at the suit of Richardson (1058, 1101). Richardson testifies (1172, 1173) that at the date of said attachment Elwell made a memorandum of the attached bonds (Exhibit No. 9, p. 367). Elwell also testifies that the bonds taken by Richardson were all of the company's unissued bonds (1049), except those in Europe (1050), and that on July 8, 1876, the date of the resolution of the board ordering the issue of bonds to Ferry, the said bonds were either in the Park Bank, with Eugene Kelly & Co., or held by himself, (1059).

Several times Elwell states that he received but eighteen hundred and fifty-four bonds from the Park Bank, but it appears (1058) that he got this number from his own memorandum (Exhibit No. 9) made a month afterwards.

And said memorandum, on its face, discloses the fact that he had received more than eighteen hundred and fifty-four bonds from Richardson, for it accounts for fifteen bonds "formerly received from B. Richardson, managing director." He was elected managing director on October 11, 1875, (810).

As Richardson took possession of twenty-nine hundred and seventy-four bonds, and separated four hundred from these for himself, and as the remainder were held by him at the Park Bank until received by Elwell, it is plain that Elwell received twenty-five hundred and seventy-four bonds. And as Elwell turned over to the

sheriff only eighteen hundred and sixty-nine bonds, as those received from Richardson, it is plain that he must have disposed of some of them between July 20 and August 21, 1876. How he disposed of them is immaterial here, except in so far as concerns the nineteen bonds claimed by Mr. Ferry.

The bonds held by Ferry were Nos. 4282 to 4300, and these are part of the bonds appearing in Exhibit No. 2. They do not appear in Exhibit No. 9. Elwell must therefore have delivered them to Ferry.

Precisely when they were delivered does not otherwise appear. But it is to be observed that Nims got twelve bonds from Ferry on July 28, 1876, (672), and that these bonds also, Nos. 4251 to 4262, are found in Exhibit No. 2, and are omitted from Exhibit No. 9.

Second. Elwell testifies (993, 994) that on October 16, 1875, he brought three hundred bonds from the safe deposit company, or bank, where they were lodged, and gave them to treasurer Ferry, who took them with him to Michigan. Ferry's receipt for said bonds (1199) does not show the numbers. If this lot contained those afterwards "retained" by him, then Ferry already had possession of them, as treasurer, on July 8, 1876. No change of possession to complete the pledge was necessary, and they became a valid pledge on the passage of the resolution and delivery of the note by the auditor and secretary, (Parsons *v.* Overmire, 22 Ill., 58; Brown *v.* Warren, 43 N. H., 430).

Richardson did not acquire possession, as treasurer, of the four hundred bonds, which were disallowed to him, until after the passage of the resolution authorizing their issue. The facts in the two cases are, therefore, *not* the same, as they are alleged by appellants' counsel to be, but radically different. In Richardson's

case it was necessary that there should be a change of possession from the company to him as pledgee.

RICHARDSON'S 400 BONDS.

First. The transfer of the four hundred bonds, which the court below disallowed, was never effected in the manner intended and directed by the company.

At the meeting of the board of directors on July 5, 1875, (Record, p. 806), "the treasurer and secretary" were instructed "to deposit" with Mr. Richardson one hundred bonds. At their meeting on August 3, 1875, (808), it was resolved that three hundred bonds should "be conveyed" to Richardson. The president and secretary gave orders on treasurer Ferry "to deliver" said bonds, (370), which orders were presented to him for acceptance only, (370, 1202), and retained by Richardson until put in evidence, (1202, 1176). Ferry testifies that he has no recollection of delivering these four hundred bonds, (1202), and that he had no knowledge as late as October 11, 1875, that Richardson had possession of them, (1203). In this he is borne out by Richardson's receipt of October 12, 1875, as chairman of the executive committee, for all the bonds in his possession as the company's property, (675), which Ferry prepared, (1206).

It is plain that Mr. Richardson intentionally or unintentionally failed to avail himself of the opportunity extended to him by the company of taking these bonds as a pledge.

Second. Richardson, as the treasurer of the company, *de facto* if not *de jure*, took possession of said bonds as the property of the company.

At the said board meeting of August 3, 1875, (808), treasurer Ferry tendered his resignation, conditionally, which was so accepted, and Richardson was elected treasurer to take effect upon the adjustment of Ferry's

accounts by the executive committee. By prior resolutions of the board, the unissued bonds were placed under the control of the treasurer, (799), and Mr. Ferry alone was allowed access to the safe in the Mercantile Trust Company, of New York, where they were deposited, (802). Shortly after his resignation aforesaid, Ferry gave the key of the safe to Richardson, (1215), as treasurer, (1111), through Elwell, (1201), for the purpose of taking possession of all the company's unissued bonds. On August 16, 1875, Ferry's accounts were examined by two of the executive committee only, (364. 368), Craw and Elwell making the examination and reporting it to Richardson, who was the third member of said committee, (805). In the same letter (368) Elwell sent Ferry's order on the Trust Company for the bonds, requesting that they should be counted, (369), in compliance with Ferry's desire, (1204), and in expectation that Richardson would receipt for them as treasurer, (1201). On August 20, 1875, the order was presented and recognized by the Trust Company, (369, 370), and Richardson took possession of the bonds, (1170), having them counted and listed by Messrs. Child and Baney (371) and by himself (372, 1171, 1212) *as the company's bonds.* Said list shows that he got twenty-two hundred and eighty-nine bonds, and it includes the four hundred bonds, Nos. 3201 to 3600, which he now claims as pledgee.

On the following day Richardson, with the help of Child and Baney, separated said four hundred bonds from the rest, and placed them in a tin box, which he afterwards kept in his personal possession, (1172, 1153, 1154). No authority was given to him to so appropriate them. It was done in secret, and afterwards kept a secret from everybody except Richardson's confidential friend, Elwell. It has all the ear-marks of fraud.

On August 21, 1875, Richardson wrote Elwell that he

was "the *bona-fide* treasurer," since Ferry's books had been examined and found correct as the resolution electing him contemplated, (1213). He also testified that he had taken possession of the bonds as treasurer, (1173, 1175, 1180), though he admitted that it was the only thing which he had ever done as treasurer, (1170 . Elwell testifies that at the directors' meeting of October 11, 1875, Richardson claimed to be the treasurer, (1087), which was disputed, (1086), and Ferry was asked to withdraw his resignation, which he did, (550). Kelly testifies that all parties agreed that Ferry's resignation had not taken effect, (1193). Elwell states that Ferry was re-elected treasurer on this occasion, (551), but the minutes do not sustain this statement, (809–815). Ferry claims to have been the legal custodian of the bonds until October 12, 1875, when Richardson, as chairman of the executive committee, receipted to him for them, (1204).

Third. In taking possession of any of the bonds, Richardson perpetrated a fraud on Mr. Ferry.

Ferry's resignation as treasurer (808) was conditioned on two things, namely, that his accounts should be examined and settled, "and the *obligations* that I have made personally for the benefit of the company be settled, or I relieved therefrom." It was accepted, to take effect "as soon as the executive committee have examined his accounts and settled the *obligations* that he has made personally for the company." These "obligations" were an indorsement of the company's notes for $20,000, (368), which Richardson assured Ferry should be taken care of, but which was not done, (1201). There was an express agreement to this effect before Ferry tendered his resignation, (1215). In his letter of August 16, 1875, (368), Elwell inclosed to Rich-

ardson two renewal notes for this loan, notifying him that Ferry would not resign or turn over the books unless they were indorsed by him. It was in this letter that Ferry's order to the Trust Company was inclosed, on which Richardson got the bonds. On August 19 Richardson replied to Elwell that he was surprised at this request for his indorsement, (363), and Elwell answered that it was in compliance with Ferry's tender of resignation and the board's acceptance, and that Ferry would not yield up the treasuryship until the matter was settled, (364). On the day after Richardson got the bonds, he wrote Elwell, (1213), declining to indorse the notes, and adding: "As to the books, he can keep them if he like. I am receiver, advancer, head cook and bottle-washer, as well as in charge of the codfish in the misson-top." On August 28, 1875, he returned the notes to Elwell, (1211). It is plain, therefore, that Mr. Richardson's possession of the bonds was fraudulently acquired.

Fourth. In taking possession of three hundred of these bonds as additional security, Richardson perpetrated a fraud on the company.

The three hundred bonds were voted to him (808) "in consideration of the sums of money advanced, and for the sums hereafter to be advanced by him for purposes of extension and equipment of the road." That he should afterwards furnish money for extension and equipment is an essential part of the contract, but his account (995) fails to show that he afterwards furnished any money for said purposes, except $5,000, which was in fact not paid by him, (1042, 1080). Elwell and Ferry testify that it was on Richardson's promise to extend the road to Lakeview that the additional bonds w re voted to him, (1048, 1200). This promise he never ful-

Seventh. Richardson admitted his want of a lien on the bonds which he claims, by allowing them to be attached as the property of the company.

Richardson denies the attachment, (399, 605), but it is proved by the following evidence. He had announced to Elwell as early as August, 1875: "What I want is every bond in my hands," (1209), and about July 12, 1876, he arranged to sue on the company's notes and attach all the bonds, including his six hundred, (1060, 1068, 1104, 1110), as shown by Elwell. He brought the suit and got the judgment, (900–905), and on August 11, 1876, sued out an attachment on all the company's property in the county of New York (905). Elwell testifies that the bonds were attached at his office, Richardson's six hundred bonds being there at the time, (1066–1068, 1094, 1101, 1104), the officer giving Elwell a receipt for the twenty-nine hundred and seventy-four bonds in his custody, (999). Douglass was present, and testifies that all the bonds were attached, including Richardson's six hundred, (660–663). The sheriff's notice showed thirty-five hundred and seventy-four bonds to be sold under the execution, (867). Thirty-five hundred and seventy-four bonds were sold by the sheriff, and bid by Richardson at $50 per bond, as the master finds, (200). The deputy sheriff's account of sales made August 19, 1876, showed the sale of "3,574 bonds of the Chicago, Saginaw and Canada Railroad Company, at $50 each, $178,700," and the sheriff's charges, approved by Richardson's attorneys, $4,144.57, (908, 909). Richardson's attorneys receipted to the sheriff for $174,555.43, "being the amount made on the within execution," and the sheriff's return was so made, (907). Richardson's attorney testifies that he signed the account of sales without reading it, (590). An extract from Richardson's check-book shows a settlement with

the deputy sheriff "for attaching and selling 3,474 bonds of C., S. & C. R. R. Co.," (728, 1070), which Richardson does not deny, (606).

Richardson's Stock.

The master reports (186–190) that Mr. Richardson received twelve hundred and fifteen shares of the company's stock, without paying any consideration therefor, in violation of the statutes of Michigan, and the value of which the law requires should be deducted from the amount of his claim as proved; but that, being unable to ascertain its value, he makes no deduction. Exceptions to this part of his report were filed, (244).

If this Court should allow Mr. Richardson's claim to four hundred additional bonds, it is submitted that the par value of said stock should be deducted therefrom for the benefit of F. A. Nims and E. P. Ferry, who were the *bona-fide* holders of twenty-one shares of stock fully paid and the only stockholders for value in the company.

Respectfully submitted:

D. A. McKNIGHT,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1880.

WILLIAM T. WASHBURN, Executor, and EMMA RICHARDSON, Executrix, of BENJAMIN RICHARDSON, deceased, and HENRY DAY, Appellants,
vs.
ASHBEL GREEN and WILLIAM BOND, Trustees, and others.

No. 19.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Brief for John Bower & Co., and John F. Betz, in his own right and as assignee of Richard Peniston, in the above-entitled cause.

STATEMENT.

This is one of five appeals which were taken from decrees in a suit in equity instituted in the court below, November 16th, 1876, by Ashbel Green and William Bond, as trustees, against the Chicago, Saginaw, and Canada Railroad Company, to foreclose a mortgage made by that company to the complainants, on May 17th, 1873, to secure 5,500 bonds of $1,000 each, payable to the complainants or bearer.

The decrees appealed from were entered in the cause respectively, on May 3d, 1883, and October 8th, 1883. (Rec., p. 294; p. 359.)

The motions made, at the last term, to dismiss the five appeals, were decided by the Court, on March 18th, 1889, in the case of *Richardson* v. *Green*, 130 U. S., 104–116.

Four of the appeals were unconditionally dismissed.

As to one of the appeals, viz., the appeal of Richardson and Day from the decree of October 8th, 1883, the Court ordered that the motion to dismiss be granted, "unless the appellants herein shall procure to be issued and served on the appellees herein a citation from this Court, in the terms before set forth, returnable at the next term thereof, provided the issuing and service of such citation shall not be duly waived."

The case is stated, generally, in the opinion of the Court, delivered by Mr. Justice Blatchford, in *Richardson* v. *Green* (*supra*).

Richardson made the first statement of his claim in his petition asking leave to intervene in the foreclosure suit, filed October 8th, 1878.

He alleged that, on August 12th, 1876, he obtained a judgment, in the Court of Common Pleas of the city of New York, against the railroad company, for $186,779.05, representing cash advances used in building the road, excepting $5,000, and interest, which were secured to him by 600 first mortgage bonds as collateral security; and that such proceedings were had, in that suit, that he claimed to have become the legal owner of the said 600 bonds, and also the legal owner of certain other 2,974 first mortgage bonds of the company, by attachment and sale in that suit. (Rec., pp. 33–37.)

A statement of the 2,974 bonds, referred to in this petition appears in the Record. (Rec., p. 367).

They were unissued bonds of the company in the custody of its secretary in New York, which Richardson caused to be seized by the sheriff on August 11th, 1876, upon an attachment issued in his suit against the company, mentioned in his intervening petition.

They included certain 1,105 bonds which had been returned from London, and which Richardson claimed he had "redeemed," under the circumstances stated in the Master's report. (Rec., pp. 199–200).

McChesney, financial agent of the company, it appears, went to London to sell its bonds.

The negotiations failed, and McChesney returned home, leaving the bonds with a bank in London.

Richardson, who was a director and member of the executive committee of the company, asked for their return and paid certain amounts for charges against them in London and for commissions to the bank; and the amounts paid by Richardson were included in his account against the company, and in the note upon which his judgment in New York was rendered.

Execution was issued on the New York judgment, and Richardson caused the sheriff to levy upon all these bonds, viz., the 600 bonds, and the 2,974 bonds, referred to in his petition of October 7th, 1878, and he bid them in at the sale for fifty cents each. (Testimony, Rec. pp. 399–400; Sheriff's report of sale, p. 461).

The claim of Richardson, at the hearing below, upon which the final decree of May 3d, 1883, was rendered, appears in his exceptions to the Master's report. (Exceptions, Rec., pp. 255–261.)

It was that he acquired absolute ownership, by his alleged purchase at sheriff's sale, of the 600 bonds, alleged to have been originally held by him as collateral security, and the 1,105 bonds, claimed to have been "redeemed" by him, as above stated.

It would seem that the original claim of ownership, made by him, to all of the 2,974 unissued bonds, referred to in his intervening petition of October 8th, 1878, and which he alleged he purchased at sheriff's sale, was abandoned below, and, so far as those bonds are concerned, that the final claim below was confined to *1,105* of them.

It is understood from the Brief, filed in this Court, by the learned counsel for the appellants, that the claim, at the final hearing below, in respect to the *1,105* bonds, is now abandoned, and that the claim here is now confined to the 600 bonds, alleged to have been originally delivered, by the company, to Richardson as collateral security for his advances, and which he purported to have purchased, at sheriff's sale, in New York, for fifty cents each, as above stated.

The special Master found Richardson to be the pledgee and holder of 200 bonds (numbered from 3001 to 3200 inclusive), and disallowed his other claims to bonds, whether as pledgee or owner. (Master's Report, filed November 23d, 1882; Record, pp. 190 to 200.)

On December 23d, 1882, Richardson and Day, filed in the court below, their exceptions to the Master's report, twenty-five in number. (Rec., pp. 255–261.)

On May 3d, 1883, the court below entered a final decree of foreclosure and sale, which provided for the distribution of the proceeds of the sale of the mortgaged property. (Decree of May 3d, 1883; Rec., pp. 295–301.)

The decree (Art. 8) overruled the exceptions to the Master's report, filed by the intervening parties, and confirmed the report except as modified by the decree. (Rec., p. 300; fol., 700.)

In July, 1883, the fund in court appears to have been for the most part distributed among the bond-claimants. (Rec., pp. 355, 1225.)

On August 6th, 1883, Sickles and Stevens filed a petition for rehearing on the question of interest on the bonds, and the mode of computation thereof; and "that in all cases where distribution has already been made an order may be made for a *return* of so much, or such parts thereof, as shall be found to be an overpayment." (Rec., pp. 341, 342.)

The reports of the clerk of the court, who distributed the fund, under the decree of May 3d, 1883, showed that the amount of the dividend of Richardson and Day was properly $57,810.73, instead of $59,984.64, which had been paid to them. (Rec., p. 358.)

On October 8th, 1883, the court entered a further decree which made a "correction" in the decree of May 3d, 1883, and contained the peculiar provisions mentioned in the opinion of the Court in Richardson *v.* Green. (Decree of October 8th, 1883, Rec., pp. 359–362).

The decree recited and ordered, *inter alia*, as follows:

"Whereas it now appears that the Wrought Iron Bridge Company received in the manner above stated $183.60, and the said claimant, Henry Day, assignee of Benjamin Richardson, received in the the same manner $2,173.91 more than they were respectively entitled to or should receive on the basis of this amended decree:

"It is further ordered and decreed that the said Wrought Iron Bridge Company and the said Henry Day, within fifteen days after service on them, respectively, of a copy of this decree, pay into this Court the sums above set forth as having been overpaid—that is to say, the said Wrought Iron Bridge Company the sum of $183.60, and the said Henry Day, $2,173.91.

"The amount of said over payments belonging to the remaining several claimants herein set forth in the following proportions and amounts," &c.

The Court, at the last term, on the motions to dismiss, expressed the opinion that, under the provisions

of this decree of October 8th, 1883, which were referred to, the amount involved, so far as Richardson and Day are concerned, was not confined to the amount that Day, as assignee of Richardson, was directed, by the above order, to pay into court as having been overpaid on his claim, and that appellants could have adjudicated, by this Court, at least, their claim in respect to the 400 bonds not allowed to them. (Richardson *v.* Green, 130 U. S., pp. 115, 116.)

As the appeal from the decree of May 3d, 1883, has been dismissed, the jurisdiction of this Court must depend entirely upon the nature and effect of the decree of October 8th, 1883.

Argument.

First.

The only brief for the appellants, which has been seen by the counsel for the appellees, contains no such assignment or specification of errors as is required by the 21st Rule of this Court, which provides that "when the error alleged is to a ruling upon the report of a Master, the specification shall state the exception to the report and the action of the Court upon it."

The merits of the claim, on the part of the appellants, were determined, by the Court below, upon the exceptions taken by them to the Master's report, twenty-five in number, which were overruled by the decree of May 3d, 1883, and the appellees are entitled to proper notice, through the appellant's brief, of the particular exceptions upon which they propose to rely, in this Court, for a reversal of the decree appealed from.

Second.

The report of the Master, as to the matters of fact, in-

volved in the cause, is *prima facie* correct, and the burden of sustaining an allegation of error, or mistake, on his part, in any of his conclusions, rests upon the excepting party.

This rule is well settled. (Medsker *v.* Bonebrake, 108 U. S., 72; Tilghman *v.* Proctor, 125 U. S., 149.)

Mr. Justice Gray, in the latter case, said:

"'In dealing with these exceptions, the conclusions of the Master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there *clearly* appears to have been error or mistake on his part.' (Medsker *v.* Bonebrake, 108 U. S., 66; Donnell *v.* Columbian Ins. Co., 2 Sumner, 366; Mason *v.* Crosby, 3 Woodb. & Min., 258; Paddock *v.* Commercial Ins. Co., 104 Mass., 521; Richards *v.* Todd, 127 Mass., 167.")

Mr. Justice Story, in *Donnell* v. *Ins. Co.* (2 Sumner, 371), said:

"It is sufficient for the court to abstain from any decision as to a matter of fact, if it is not clearly satisfied that there has been *unquestionable error*."

This Court will not wander at large into the evidence to ascertain whether, by possibility, the Master was wrong in his conclusions or not.

THIRD.

The Master was right in finding that Richardson held as pledgee, only, 200 bonds, numbered from 3,001 to 3,200 inclusive, and in disallowing his claim, as pledgee, or owner, of 400 bonds, numbered from 3,201 to 3,600, inclusive.

The report upon Richardson's claim is found in the Record (*pages 190* to *202*).

On March 31st, 1875, an agreement was made between

Richardson and the railroad company, by which he was to make his note for $100,000 to enable the company to purchase iron to complete a division of 20 miles of its road, and as collateral security the company was to deliver to him 200 bonds. Richardson was to receive interest at seven per cent. on moneys paid by him on account of the note, and to be elected a director of the company. When completed the company should lease the road and assign to Richardson the lease and all subsidies received. The company should issue to him full paid certificates for 1,250 shares of its stock. (Rec., pp. 412, 415; Master's Report, *ib.*, pp. 190–193.)

On April 5th, 1875, the 200 bonds, (Nos. 3,001 to 3,200,) called for by the agreement, were delivered to him by the company to secure the $100,000 to be paid by him.

The receipt to the company for these bonds is in the Record (page 673).

It is as follows:

"Received, New York, April 5th, 1875, of the Chicago, Saginaw & Canada Railroad Company two hundred of the first mortgage gold bonds of said company of one thousand dollars each, numbering from 3,001 to 3,200 inclusive, as collateral security to certain notes this day placed in the hands of the treasurer of said company under the provisions of a certain contract made and executed between myself and the said company, March 31st, 1875.

"BENJAMIN RICHARDSON.

"Two hundred thousand dollars in bonds, Nos. 3,001 to 3,200, inclusive."

[Endorsed]: Benjamin Richardson. Receipt — 200 bonds. March 31st, 1875.

On May 28th, 1875, John A. Elwell was elected secretary of the company, and Richardson was placed on the Executive Committee. (Rec., p. 805.)

On July 5th, 1875, it was resolved, by the directors, that the treasurer and secretary be instructed to deposit with Richardson 100 bonds as additional security for moneys advanced by him since March 31st, 1875, and that may be advanced on the iron contract with the Cleveland Rolling Mill Company. (Rec., p. 806).

On August 3d, 1875, it was resolved that Richardson be elected treasurer of the company, the same to take effect as soon as Mr. Ferry's accounts, as treasurer, shall have been duly adjusted by the executive committee.

On the same day, it was resolved that, in consideration of moneys advanced by Richardson and for sums thereafter to be advanced by him for purposes of extension and equipment of the road, as well as advances made by him of every nature whatsoever, that an additional amount of 300 of the company's bonds be conveyed to Richardson as collateral security, and that the sums advanced by him should bear interest at ten per centum, per annum, payable semi-annually. (Rec., p. 808.)

Richardson claimed that certain 400 bonds, Nos. 3201 to 3600, were delivered to him, as collateral security, under and in pursuance of the above mentioned resolutions of July 5th, 1875 and August 3d, 1875.

The Master found that those bonds were never, in fact, delivered to him, as a creditor, under the resolutions, but that he took them out of a number of 2,289 unissued bonds of the company in his care and custody for other purposes. (Master's report, Rec., p. 198, fol. 455.)

The Master also held that if the 300 bonds voted by the resolution of August 3d, 1875, had been delivered, he could not in equity and good conscience hold them as security, because he did not carry out the promises he made to the directors, under the influence of which the bonds were voted. (See the facts found by the Master upon this subject, Rec., pp. 201, 202).

There are no receipts, in the record, given by Richardson to the company, or any of its officers, for any bonds purporting to be delivered to him, as security, under either of the resolutions of July and August, 1875.

A formal receipt (*supra*) was taken from him by Edward P. Ferry, the treasurer, when the 200 bonds were delivered to him, giving the numbers of the particular bonds, and the transaction for which they were security.

Orders, purporting to be dated July 5th, 1875, and August 3d, 1875, and accepted by Edward P. Ferry, treasurer, for the delivery to Richardson of 100 and 300 bonds, were produced by him, after the Master's report, but they were always kept in Richardson's possession, and were never given up to the company by him, which would appear to show, conclusively, that the orders were never executed by the delivery to him of any bonds under them, or the resolutions referred to in them. (Rec., p. 370; Richardson's Testimony, Rec., pp. 1176–1178.)

Richardson said, on cross-examination, that he presumed the orders went into his counsel's hands, along with other papers. (Page 1178.)

The Master states that "on August 3d, 1875, Mr. E. P. Ferry resigned his office to take effect when he should be settled with. Richardson was at the same time elected treasurer, to take effect as soon as Mr. Ferry's accounts were adjusted by the executive committee. This appears, by the treasurer's journal, (p. 18,) to have been done on the 16th of August, 1875." (Rec., p. 197, fol. 454.)

The proofs show that the president and treasurer of the company signed an order upon the Mercantile Trust Company, New York, to deliver to Benjamin Richardson the bonds of the Chicago, Saginaw and Canada Railroad Company, in its safe-vault, the keys of which were held by him.

On August 20th, 1875, there was endorsed on this order

the advice of Alexander and Green that the contents of the safe, No. 2,492, be delivered to Richardson, taking his receipt. (Rec., pp. 369, 370.)

On the same day, it is said, he selected, out of the contents of the safe, consisting of 2,289 unissued bonds, counted by Child and Baney, thus in his custody as treasurer, 400 bonds, (Nos. 3201 to 3600, inclusive,) and took, or purported to take, them into his individual possession. (Rec., pp. 371, 372.)

Richardson testified that he was treasurer of the company at this time, and that Ferry gave him the keys of the safe in New York, with an order to get the bonds, and he took them as treasurer. (Rec., p. 1,170, fol. 2,508; p. 1,181; Letter to Elwell, August 21, 1875, Rec., p. 1,213.)

When Richardson was first examined, he said he did not know where he got the bonds. (Rec., p. 407.)

On October 11th, 1875, Richardson was appointed managing director, irrevocable, and chairman of the executive committee, and it was resolved that the executive committee should have power to sell and dispose of the bonds of the company. (Rec., 810.)

On October 12th, 1875, Richardson gave to Ferry the receipt mentioned in the Master's report (Rec., p. 197), as follows:

"Received of Edward P. Ferry, Treasurer of the Chicago, Saginaw and Canada Railroad Company, 2,289 of the first mortgage bonds of the company, numbered as detailed by the memorandum above, dated New York, August 20th, 1875, and signed by O. W. Child and M. J. Baney, *placed in my custody as Chairman of the Executive Committee of said Railroad Company*, in accordance with the resolution of the Board of Directors, passed October 11th, 1875, for custody, disposal or sale.

BENJAMIN RICHARDSON."

Appended to this receipt was a copy of the list of bonds

as counted by Child and Baney, on August 20th, 1875, as above mentioned. (Rec., pp. 674, 675.)

The list so receipted for by Richardson, as chairman of the executive committee, *included the 400 bonds, numbered from 3201 to 3600*, claimed to have been delivered to him as collateral security, by the company.

Elwell testified that, at the meeting of October 11th, 1875, none of the parties knew that Richardson held those bonds. (Rec., p. 1051.)

Ferry testified that he did not know, at that time, nor was any claim made by Richardson, that he had separated 400 of the bonds and taken them into his possession as pledgee. (Rec., p. 1303.)

The Master held that the express terms of the above receipt negative the idea that the 400 bonds claimed, were delivered in pledge to Richardson, for moneys advanced to the company previous to that date. (Rec., p. 198; fol. 455.)

The facts stated show conclusively that there never was any delivery of the possession of these 400 bonds (Nos. 3201–3600) to Richardson, individually, by the railroad company, so as to constitute them a valid pledge to him.

The actual delivery of the specific property by the pledgor to the pledgee, where it can be effected, is of the very essence of a pledge; and without it, the contract is only *executory*. (2 Story on Contracts, sec. 719; Story on Bailm, sec. 297; Casey *v.* Cavaroe, 96 U. S., 477.)

The custody of the 2,289 unissued bonds was given to Richardson, as an officer *de jure* or *de facto*, of the company; and the possession of the 400 bonds, out of that number, claimed by him, was never delivered by the company to him, in his individual capacity, as pledgee.

The Master, in his Report, finds that the railroad company never *ratified* Richardson's act in severing these 400 bonds from the body of the 2,289 unissued bonds, as mentioned. (Rec., p. 198, folio 456.)

There could be no valid and efficient ratification, by the board of directors of the company, unless they had full knowledge of the facts of the transaction. (Owings *v.* Hull, 9 Pet., 629.)

So far as appears, the only delivery of bonds to Richardson in pledge, known to the Board, at the time of the resolution of July 8th, 1876, was that mentioned in the official receipt for the 200 bonds, dated April 5th, 1875, (*supra.*)

If stock notes were originally made by Elwell, and given to Richardson, they were destroyed, and demand notes substituted. (Rec., p. 415, *et seq.*)

The Master correctly finds that "with the exception of 200 bonds which had been delivered to him as collateral security, all of the bonds sold at the sheriff's sale (above mentioned), were unissued bonds, and of no legal or binding obligation against the company, and were not *subject to levy and sale on execution;* and that by selling and bidding off the *200 bonds*, in the manner and circumstances disclosed by the evidence, he did not derive an absolute ownership therein, or any greater rights than he before had as pledgee." (Rec., p. 200, fol. 459.)

Although the sheriff had seized only 2,974 attached bonds, he purported to sell, under the execution, besides those bonds, the 200 bonds, received April 5th, 1875, and the 400 bonds, taken by Richardson out of the 2,289; the total number of bonds, sold on the execution, being 3,574. (Rec., pp. 367, 461.)

FOURTH.

It is respectfully submitted that the decree below should be affirmed, with costs.

J. HUBLEY ASHTON,
HENRY M. DECHERT,
HENRY T. DECHERT,
Counsel for John Bower & Co. and John F. Betz.